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DISTRICT II

July 18, 2018

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You are hereby notified that the Court has entered the following opinion and order:

2017AP2190

City of Oshkosh v. Joseph E. Kubiak (L.C. #2015CV537)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

The City of Oshkosh appeals from an order dismissing its claims against Joseph Kubiak ordering it to pay Kubiak the \$2,000 he demanded in his counterclaim against the City and awarding him his costs and attorney's fees. Upon reviewing the briefs and the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(2015-16).¹ We affirm the dismissal of the City's claims against Kubiak but reverse

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

the court's sua sponte resurrection of Kubiak's counterclaim and the award of costs and fees.

This is the parties' second appearance before this court regarding the City's claim that Kubiak violated its Special Events Ordinance (the Ordinance) by failing to obtain a permit and pay certain fees in connection with the semi-annual "Oshkosh Pub Crawl." As the facts are fully laid out in our first decision, see *City of Oshkosh v. Kubiak*, No. 2016AP804, unpublished slip op., ¶¶2-6 (WI App Feb. 15, 2017), we will not recount them here. The sole issue in that appeal was whether the trial court properly determined that the term "organizer" in the Ordinance was unconstitutionally vague. *Id.*, ¶8.² We concluded it was not and reversed and remanded for a determination of whether Kubiak was the organizer of the Pub Crawl. See *id.*, ¶¶16-17.

On remand, the parties agreed that the new trial judge could render a decision based upon the existing trial record and the parties' briefing of whether Kubiak violated the Ordinance.³ After reviewing the trial transcript, exhibits, and the parties' submissions, the trial court determined that Kubiak was not the organizer of the Pub Crawl and dismissed the City's complaint. It also sua sponte reversed the prior court's dismissal of Kubiak's counterclaim, granted a \$2,000 judgment in his favor, and ordered the City to pay Kubiak's circuit court costs and those associated with the City's original appeal on which the City had prevailed and had been awarded costs. The City again appeals.

The City contends the trial court erroneously exercised its discretion by failing to

² The trial court also dismissed Kubiak's counterclaim; he did not cross-appeal the dismissal. *City of Oshkosh v. Kubiak*, No. 2016AP804, unpublished slip op., ¶7 n.1 (WI App Feb. 15, 2017).

³ The Honorable Thomas J. Gritton presided over the first trial. The Honorable Scott C. Woldt presided over the second trial.

reasonably examine the record in deciding that Kubiak was not the organizer of the Oshkosh pub crawl. We are not reviewing an exercise of discretion. Rather, after a trial to the court, we review whether the evidence was sufficient to sustain the court's decision, and we sustain the decision unless the court's findings are clearly erroneous. *See* WIS. STAT. § 805.17(2). When acting as factfinder, the trial court is the ultimate arbiter of witness credibility. *See id.*; *see also State v. Peppertree Resort Villas, Inc.*, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345. If more than one reasonable inference may be drawn from the credible evidence, we must accept the inference the trial court drew. *Onalaska Elec. Heating, Inc. v. Schaller*, 94 Wis. 2d 493, 501, 288 N.W.2d 829 (1980).

The court found that Kubiak had no responsibility for systematic planning or coordination of individual efforts in regard to the Pub Crawl, that he simply capitalized on an already-established event by making and selling T-shirts, and that he initially obtained a permit and paid certain fees only to “be a good neighbor and work with the City.” It thus concluded that Kubiak was not liable for the fees the City sought to collect from him. These findings are not clearly erroneous.

On its own motion, the trial court then revived Kubiak's abandoned counterclaim by which he had sought reimbursement from the City of the \$2,000 he had paid it to settle their dispute over what the City claimed he owed for the April 2014 Pub Crawl. Kubiak neither appealed the March 2016 dismissal of his counterclaim nor asked for it on remand. We conclude it was error for the court to resurrect it.

A court possesses inherent authority to set aside, at any time during the term, any judgment or order it entered through mistake, inadvertence, or want of proper deliberation.

Smith v. Milwaukee Elec. Ry. & Light Co., 119 Wis. 336, 340, 96 N.W. 823 (1903). We are unaware, however, of any authority for the principle that a court may sua sponte vacate and reverse a prior final order dismissing a claim which was not challenged on appeal, not revived upon remand, and when no argument was made either before the trial court or on appeal as to mistake, inadvertence or want of deliberation. We thus reverse.

Finally, we address costs. A trial court has considerable latitude when awarding costs to a prevailing party. A party seeking to recover costs must file a statement of costs within fourteen days of the filing of the decision of the appellate court. WIS. STAT. RULE 809.25 (1)(c). Kubiak did not do so as he did not prevail and we did not remand for a determination of costs. The trial court had no authority, and gave no explanation for its decision, to award costs to Kubiak from the City's first appeal in which it prevailed. We therefore reverse the award of costs.

IT IS ORDERED that the order of the circuit court is summarily affirmed in part and reversed in part, pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals